

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY,)	
)	
Employer,)	
and)	
)	Case No. 13-RC-121359
COLLEGE ATHLETES PLAYERS)	
ASSOCIATION (CAPA))	
)	
Petitioner.)	

**Amicus Brief by
National Association of Collegiate Directors of Athletics
and
Division 1A Athletic Directors' Association**

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I. STATEMENT OF AMICUS CURIAE

The National Association of Collegiate Directors of Athletics (“NACDA”), is a not-for-profit professional association for those engaged in the field of intercollegiate athletics administration – for all divisions. NACDA has a membership consisting of more than 6,000 individuals representing more than 1,600 college institutions throughout the United States, Canada and Mexico. Its members include athletic directors, athletic administrators, associate and assistant athletics directors, conference commissioners and others. NACDA sponsors educational clinics, workshops and seminars to provide training in the field of athletics administration. NACDA also facilitates networking and the exchange of information among its members, and advocates issues that are important to its profession.

The Division 1A Athletic Directors’ Association (“D1A”) is dedicated to creating and implementing standards to ensure the ethical and responsive administration of intercollegiate athletics, and to promote communication between its members. DIA is also dedicated to enhancing the health, safety, education, social wellbeing, and the athletic experience of the student-athlete.

NACDA and D1A submits this brief because they view this case as being important to the future of college athletics in the United States. NACDA and D1A, being organizations that represent those who are responsible for administering college athletic departments and programs, believes that the Decision of the Regional Director of Region 13 dated March 26, 2014 (the “Decision”), unless reversed, will fundamentally

change the relationship between scholarship athletes and their colleges. NACDA and D1A also believe that these changes will interfere with the educational mission of colleges, negatively impact college athletics and negatively impact the student-athletes. Because of these adverse consequences and because this Decision is inconsistent with the policy of the National Labor Relations Act (“NLRA” or “Act”) and with past Board precedent, NACDA and D1A urge that the Decision be reversed.

I. INTRODUCTION

The Regional Director’s Decision should be overturned because:

- (1) it contradicted the Board’s prior rulings regarding the nature of a student’s relationship with a university, and ignored numerous differences between employees and student-athletes;
- (2) it improperly focused only on the university’s relationship with the student as an athlete, and ignored the university’s role as educator and the athlete’s role as student;
- (3) it misapplied the common law test for employees by mischaracterizing the tender and/or letter of intent as a contract for athletic services (when it is not), over-emphasized the degree of control exercised by the university over the student-athlete, and over-emphasized the importance of the revenue generated by the football program alone; and
- (4) the imposition of collective bargaining on scholarship football players will negatively impact the educational process and the college model of athletics, all contrary to the policy of the NLRA.

In the final analysis, the Decision fails to take into account the full nature of the relationship between the university and the student-athlete and alters that relationship in a manner that is contrary to the educational goals of the university and contrary to the policy of the NLRA.

II. LEGAL ARGUMENT

A. Review of the Total Relationship Between the Student-athlete and the University Shows that Scholarship Football Players are Not Employees.

1. The Regional Director's Decision That Scholarship Football Players Are Employees is Contrary to Prior Board Rulings

The Regional Director found that Northwestern University's students who are receiving football scholarships are "employees" within the meaning of the NLRA and may engage in collective bargaining. The Regional Director defined the bargaining unit to include all football players receiving football grant-in-aid scholarships and who have not exhausted their playing eligibility at Northwestern University ("NU").

But this conclusion violates a fundamental understanding of who employees are - as defined by this Board. In *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999), the NLRB recognized that an employee is one who works for another for financial or other compensation. *Id.* at 1274, 1275. The Board has also recognized, consistent with the policy of the NLRA, that the compensation that is exchanged for the work is typically in a form that permits the employee to satisfy his/her financial obligations and to carry on with life. *Id.* 1275 - 1276. This understanding is implicit in the notion that employees work for an income to provide for their livelihood.

An easily recognizable example of an employee, consistent with that definition, is any fulltime person who is paid on an hourly basis (*i.e.*, non-exempt under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*). Such a person is hired to perform a specific job under the direction, and for the benefit of, the employer. But when the characteristics of a non-exempt employee hired by a university (*e.g.*, a janitor), are compared to a student admitted to a university with a football scholarship, the differences show that the student-athlete is not an employee.

Hourly employees

Scholarship Football Players

The job is not conditioned upon being accepted as a student to the university.	Scholarship football players must apply and be accepted to the university as a condition precedent to receiving the scholarship.
Employees are paid a specific, agreed upon amount for each hour worked.	Scholarship football players are not compensated based upon an agreed, specific, hourly rate.
Employees are paid only for the hours actually worked.	Scholarship football players are not compensated based upon hours "worked," or based upon the time playing or practicing football.
Employees performing the same or similar tasks will be paid at different rates depending on their skills and/or seniority.	Scholarship football players are all given the same scholarships regardless of skills, performance or seniority.
Employees are compensated based upon the perceived value of the work being performed as determined by the minimum wage or the free market.	The value of the scholarship is based upon the cost of tuition and not upon any perceived value of the football player's performance.
Employees are paid wages which they may spend as they see fit.	Scholarship football players do not receive a wage that can be spent.

Employees are entitled to overtime for each hour worked in excess of 40 during a work week (<i>see</i> The Fair Labor Standards Act 29 U.S.C. § 201 <i>et seq.</i>).	Scholarship football players do not receive overtime compensation.
Employers are required to keep accurate records of the time worked by the employee (<i>see</i> The Fair Labor Standards Act).	Records are not kept of each hour spent by scholarship football players engaged in athletic activities (except those required by the NCAA).
Employees are entitled to elect continuation of group health benefits under the Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 U.S.C. § 1161 <i>et seq.</i>	Scholarship football players are not extended benefits under COBRA.
Employees participate in, and are entitled to compensation and health care benefits under workers' compensation laws.	Scholarship football players do not participate in workers' compensation programs.
Employees are entitled to temporary financial assistance under unemployment compensation programs and laws.	Scholarship football players do not receive unemployment compensation benefits.
Employees are entitled to protection from discrimination and retaliation under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e <i>et seq.</i> and under the Americans with Disabilities Act (ADA), 42 U.S.C. § 42111.	Scholarship football players do not receive Title VII or ADA protection.
Employees reasonably anticipate periodic wage increases.	Scholarship football players do not receive raises.
Employees are typically entitled to employer paid benefits, such as pensions, paid vacation days, paid sick days and paid holidays.	Scholarship football players are not given paid time off or other similar "employer" sponsored benefits.

Employees can be fired for unsatisfactory work performance, terminating the payment of wages.	Scholarship football players cannot be “fired” or lose their scholarship for unsatisfactory athletic performance.
Employees can be laid off, without pay, based upon the employer’s needs.	Scholarship football players cannot be laid off and they cannot lose their scholarships based upon the needs of the university.

Employers, in order to protect their business from unfair competition, may bind employees with confidentiality agreements and/or agreements not to compete.	Scholarship football players are not subject to such agreements, and they may transfer to other schools and participate in competing athletic programs (with the loss of one year eligibility under NCAA rule).
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Additionally, three other important distinctions between those who are easily recognizable to be an employee and student-athletes are:

Employers are interested in teaching their employees only what is necessary so that their employees may satisfactorily perform their specific tasks.	The university is keenly interested in educating the student-athlete in a wide variety of subjects, to prepare them for a work life after college and to build the necessary character to be successful in life.
Employees are subject to performance standards and are subject to review in order to maintain their employment.	Scholarship football players are not required to play at any specified level of performance or even to “make” the team in order to receive the scholarship.
The work performed by the employee is primarily for the benefit of the employer.	The university is primarily interested in educating and preparing the student-athlete for life for the benefit of the student-athlete.

This comparison between people who are easily recognizable as being employees and student-athletes shows, at a common sense level, that student-athletes do not have the characteristics of employees. Conversely, this comparison also shows that NU does not have the characteristics of an employer in its relationship with student-athletes who participate in the football program.

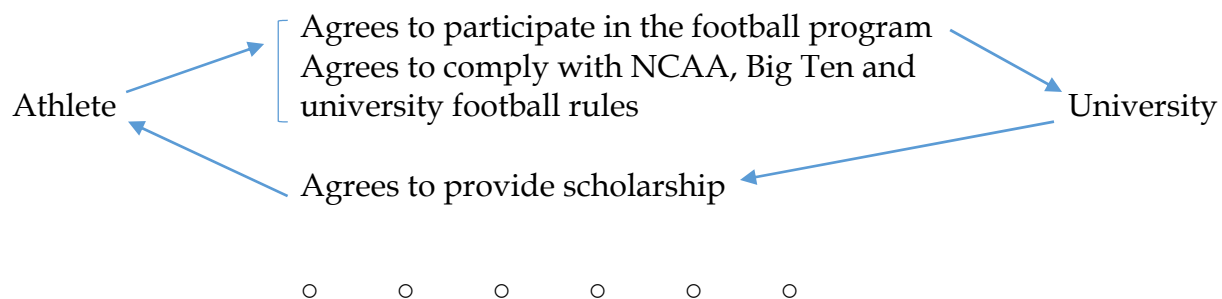
This common sense view (and the analysis) showing that students are not employees has consistently been affirmed by NLRB. *See San Francisco Art Institute*, 226 NLRB 1251 (1976), [Wherein the Board determined that students - who worked part-time as janitors for a school in exchange for tuition scholarships - were “not appropriate for purposes of collective bargaining.” *Id.* at 1252.]; *The Leland Stanford Junior University*, 214 NLRB 621 (1974), [Wherein the Board declined to treat research assistants in the physics department, who are paid in the form of grants or stipends, as employees under the NLRA.]; *Saga Food Service of California, Inc.*, 212 NLRA 786 (1974) [Wherein the Board declined to include students who worked part-time in a cafeteria in a dormitory complex, and who were paid based on their length of service, in a bargaining unit with non-student, full-time employees.]; and *Brown University*, 342 NLRB 483 (2004), [Wherein the Board declined to treat graduate teaching assistants, each of whom receive the same stipend, as employees for purposes of collective bargaining under the NLRA.].

Thus, an unfiltered evaluation of common characteristics of employees and student-athletes and prior Board rulings show that students attending college on athletic scholarships are not, and should not be considered as, employees.

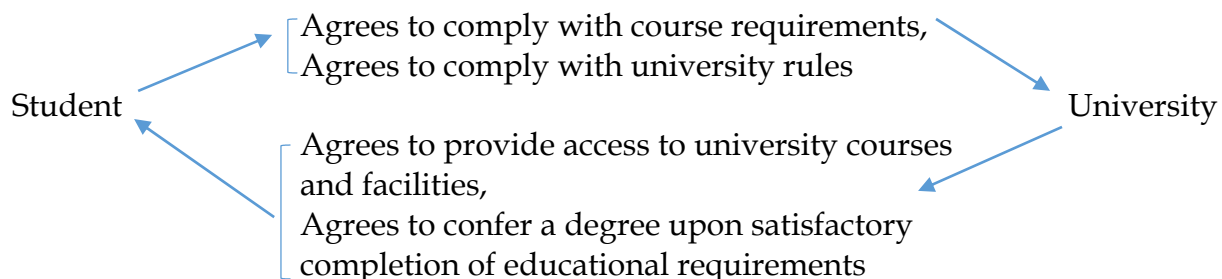
2. The Regional Director Failed to Properly Consider the Full Scope of the Student-athlete's Relationship with the University

Given these common sense distinctions between typical employees and student-athletes and the prior case authority showing that scholarship football players are not employees, how did the Regional Director arrive at the opposite conclusion? The Regional Director was able to conclude as he did because he viewed the student-athlete as having two separate relationships with the university instead of one. Specifically, the Regional Director, without specifying it, saw one relationship based upon the person's status as an athlete and another relationship based upon that person's status as a student.

Relationship as Athlete



Relationship as Student



The Regional Director then focused exclusively on the student's relationship with the university as an athlete. By doing so, the Regional Director was able to

mischaracterize the scholarship as a contract to play football, over-emphasize the degree to which the student-athletes are “controlled,” and over-emphasize the importance of the revenue that is derived from the sport.

Although these points are addressed more thoroughly *infra* at 11 -17, the Regional Director was wrong in these respects because he:

1. Mischaracterized the Tender and Letter of Intent as a Contract to Play Football. The Regional Director determined that the tender was a contract for hire. Decision at 14. But there is nothing in the Tender, Letter of Intent or the NCAA, Big Ten or NU rules, that require the student play football at any specified level of performance, or even that he make the team as a condition of receiving or keeping the scholarship. (See Em. Exs. 5 (NU 000968-974), 16, 20 and 22). At most, in the Tender, there is an affirmation that the student may lose the scholarship if he voluntarily withdraws from the team. (Ex. 5, NU 000971). Fairly read, this statement obligates the student to do no more than try out and/or participate in the sport. This was affirmed by testimony that the scholarship is unaffected by injury, poor play, or if the athlete is replaced because a better player comes along. (Tr. 493). There was also testimony that the four year scholarship remained in place even if the student never played a single game or graduated in less than four years. (Tr. 493-494). This evidence describes a relationship that is far removed from the Regional Director’s description of the scholarship as being “clearly tied to the player’s performance of athletic services,” and that it represents a “transfer of economic value.” Decision at 14-15.

2. Over-emphasized the Degree of Control. The Regional Director described the control exercised by the university over the scholarship football players as “strict and exacting” and present “throughout the entire year.” But this control, however it is described, is no different than the control exercised over other students who also participate in extracurricular activities at the university. In other words, the type of control evidenced in this case is typical and inherent in the school – student relationship. Also, to the extent there are special rules that apply to football, they are imposed by the NCAA or the Conference, not the university. (NU Br. at 29-32). Finally, these rules (and the control they imply) do not specifically relate to the performance of any duty that the student must perform as an athlete. For example, the rules concerning: scheduling, GPA, social media, ethics, talking to the press, violence, drug use, class attendance, residence, or amateur status, have nothing to do with blocking and tackling. Thus, the type of control being exercised here is not the type of control exercised by an employer over an employee performing a task.

3. Over-emphasized the Importance of Revenue. The Regional Director noted that NU’s football program generated 235 million dollars during the past nine (9) years and then concluded that the scholarship football players provide a “valuable service.” Decision at 14. While the statement about the revenue is correct, it is also irrelevant to the legal issue. This point was recognized by the Petitioner. In CAPA’s Post Hearing Brief, it affirmed that “this case is not about how much money Northwestern makes from football, or whether Northwestern is a good employer or whether the compensation provided to the [sic] Players is fair.” *Id.* at 2. Rather, as

argued by CAPA, the issue is whether the football players are employees. Moreover, the answer to that question is independent of “whether his compensation is generous or parsimonious,” or whether the so called employer is profitable or not. *Id.* at 2. (*See also* Tr. 660-661).

Accordingly, by focusing exclusively on the student’s relationship with the university as an athlete and ignoring the student aspect of the relationship, the Regional Director presented an incomplete picture of the overall relationship. This, in turn, allowed the Regional Director to mischaracterize and/or to over-emphasize facts in order to arrive at an incorrect conclusion.

Furthermore, by focusing exclusively on the athletic relationship, the Regional Director was able to ignore other important aspects of the football players as students and NU’s commitment to educating them and preparing them for life. For example:

- Scholarship football players are not hired but are admitted as full-time students. (Tr. 813-817, 1026, 1031).
- Prowess on the field cannot make up for failing at academics and will not win admission to NU, or allow a player to remain after being admitted.
- NU football players have a 97% graduation rate and a cumulative GPA over 3.00. (Tr. 499-501, 912-913, 1025).
- Football is part of the educational process at NU, specifically it is one of 480 co-curricular programs offered at NU. (Jt. Exs. 21, 28 (NU 002380).
- The football season and program operate only four (4) out of the nine (9) months that make up the academic year. (Em. Ex. 9).
- Much of the time spent by football players on football activities is voluntary, and does not equal the amount of time devoted to studies. (Tr. 176, 1236-1237, 1291, 1320).

- Scholarship football players have the right to attend NU for four (4) years, even if they do not play football. (Tr. 494)
- NU athletic department operates at a loss; thereby showing that it operates athletic programs as part of its educational program and not as part of an economic enterprise. (Tr. 676-677; Em. Ex. 11).

When the full scope of the relationship between the university and student-athlete is taken into account – and not just the athletic relationship – it is apparent that their relationship is based upon education, guidance, character building and preparation for life. It is also apparent that the student-athlete is not in attendance at NU to work at a job, or to perform a service for compensation in the same or similar manner as a non-exempt, hourly employee. Accordingly, the Regional Director's conclusion that scholarship football players are employees is in error.

B. Scholarship Football Players Are Not Employees Under the Common Law Test.

As noted, the Regional Director determined that football players receiving grant-in-aid scholarships are employees with the meaning of the NLRA. The Regional Director arrived at this decision by using the common law definition of "employee." Decision at 13. Under that test, an employee is one who: (1) performs services, (2) under a contract for hire, (3) subject to the control of another, (4) for payment. In the Decision at 14 – 17, the Regional Director analyzed each of these elements and found that they were satisfied. But his analysis is not correct.

1. The Tender/Letter of Intent is Not a Contract For Hire

In the Decision at 14, the Regional Director concluded that the tender letter (Em. Ex. 5, NU 000969) was an employment contract. Specifically, in this regard, the Decision reads:

Equally important, the type of compensation that is provided to the players is set forth in a “tender” that they are required to sign before the beginning of each period of the scholarship. This “tender” serves as an employment contract and also gives the players detailed information concerning the duration and conditions under which the compensation will be provided to them.

The Regional Director also stated, without analysis, that “it is clear that the scholarships that players receive are in exchange for the athletic services being performed.” *Id.* at 15.

As reflected in the record, under NCAA rules, NU is permitted to offer athletic scholarships to prospective student-athletes on August 1, prior to the start of the student’s senior year in high school. (Tr. 483). The next contact that that NU may have with the prospective student-athlete is six (6) months later in February. At that time, the student may be presented with a National Letter of Intent for signing. NCAA rules regulate the content of the National Letter of Intent, which must be accompanied by the tender (offer) of a scholarship. (Tr. 488).

The Employer’s Exhibit 5 provides an example of the documents sent to prospective student-athletes. The documents comprise:

- A cover e-mail from NU’s Director of Compliance advising the student-athlete that he is being offered an athletic scholarship. The e-mail also references the National Letter of Intent and the Big Ten Tender, and notes the dates by which they must be signed. (NU 000968).

- Big Ten Tender of Financial Aid indicates that it is for a full grant, that it is subject to the athlete's being admitted to the university, that the tender is subject to compliance with university, Big Ten and NCAA rules, and the date by which it must be signed. (NU 000969-70).
- Schedule A to the Big Ten Tender references specific conditions that must be satisfied to receive the financial aid, and identifies specific events that will not affect the grant-in-aid scholarship. (NU 000971).
- The National Letter of Intent confirms that an offer of financial aid had been made, and identifies other terms and conditions associated with the extension of financial aid. (NU 000972-974).

The execution of these documents represents an exchange of promises between the university and the student-athlete, and forms a legally enforceable contract. (Tr. 488, 490-492, 733). But what is each side promising to do? From a reading of the contract documents, the university promises to provide to the applicant financial aid comprising full tuition, fees, room, board and books for four (4) years. The university also specifically agrees that this four (4) year promise of financial aid college cannot be revoked:

- on the basis of my athletics ability, performance or contribution to the team's success,
- because of an injury, illness, or physical or mental condition, or for any other athletic reason. (Em. Ex. 5, NU 000971).

Also, upon acceptance of the applicant as a full time student, the university agrees to confer upon him all of the rights and privileges as it would on any other student, including the award of a degree upon successful completion of course material.

As for the student-athlete, from a reading of the contract documents (Em. Ex. 5), he promises to:

- apply for acceptance to the university,
- comply with the university rules,
- comply with the NCAA rules, and
- comply with the Big Ten rules.

The student-athlete also promises:

- not to withdraw from the university, and
- not to “voluntarily withdraw from a sport at any time for any reason.”

Fairly read, there is no promise contained in these documents that the recipient of the scholarship must play football at any specified level of performance or even that he must “make” the team. Moreover, the contract emphasizes this point by specifically stating that the scholarship is independent of athletic performance. At most, implied in the promise that the player will not “voluntarily withdraw” from the sport, is a promise that the recipient will try out for the team and/or participate, but no more. In the absence of a contract promise to achieve any specified level of athletic performance or even to start on the team, this exchange of promises does not constitute a contract for hire or reflect the receipt of compensation in exchange for “labor or services.” *See San Francisco Art Institute*, 226 NLRB 1251 (1976), *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999); *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 92 S.Ct. 383 (1971).

Furthermore, these promises are far removed from the characterization made by the Regional Director that the scholarship is “clearly” in exchange for the “athletic

services to be performed.” Decision at 15. Accordingly, because there is no contract for hire, the football player on scholarship cannot be an employee under the common law test.

2. Scholarship Football Players Are Not Subject to Control in the Same Manner or For the Same Purposes as Employees

In the Decision at 15-16, the Regional Director found that “scholarship football players are subject to the employer’s control in the performance of their duties as football players.” The Regional Director then noted that the coaches exercise “strict and exacting control” over the football players beginning with training camp, during the regular season and while traveling. According to the Regional Director, this control extends into their personal lives and governs: living arrangements, outside employment, personal vehicles, internet postings, speaking to the media, alcohol and drug use, and gambling. Lastly, the Regional Director noted that the football players are also required to participate in a four-year NU For Life Program, attend study hall, meet with tutors and participate in advisory programs. Based on these facts, the Regional Director concluded that scholarship football players are “pervasively” controlled once they accept a football scholarship.

But this is not the type of control exercised by an employer over an employee. As a matter of common experience, employers exercise control over employees only to the extent that is necessary to ensure the satisfactory completion of the task assigned by the employer. Here, nearly all of the rules cited by the Regional Director (and the

control they reflect) have nothing at all to do with how they perform their sport. Specifically, the travel rules, the personal restrictions governing internet postings, drug and alcohol use, speaking to the media, the NU For Life Program and all of the academic support programs have nothing to do with blocking or tackling. Thus, these rules and the control they reflect, rather than ensuring that the football players will satisfactorily complete their athletic duties, are in place to ensure their success in school, success in life after school, and for their protection and well-being.

In other words, the rules relied upon by the Regional Director do not demonstrate the control of an employer narrowly focused upon the successful completion of a task but the control of a university regulating the activities of its students engaged in a co-curricular activity. The finding of the Regional Director, therefore, that scholarship football players are subject to control so as to make them employees under the common law test is in error.

3. Scholarship Football Players Do Not Receive Pay in Exchange For Athletic Services

The last two elements of the common law test for employees are: they must perform services, and they must do so for pay. The Regional Director found that these elements were also satisfied. Decision of 14-15. In this regard, the Regional Director noted that:

- NU football program generated \$235 million during a nine (9) year period,
- NU received other non-quantifiable benefits from a successful football program,
- NU recruits football players based upon their athletic prowess.

The Regional Director then concluded:

Thus, it is clear that the scholarships the players receive is compensation for the athletic services they perform for the Employer throughout the calendar year, but especially during the regular season and postseason. That the scholarships are a transfer of economic value is evident from the fact that the Employer pays for the players' tuition . . . for up to five years. Decision at 14.

But, as discussed, the exchange of promises that comprise the scholarship contract refute this conclusion. While it is accurate that scholarships have value, under the contract provisions, the applicant is not required to start on the team (or even to play in a single game) in order to receive or keep the scholarship. Fairly read, the terms of the scholarship require only that the applicant "not voluntarily withdraw." While there is an expectation that the applicant will play and a hope that he will play well, the athlete makes no promise that any level of athletic performance will be achieved. Also, as noted, the scholarship specifically states that it is awarded without regard to athletic ability, performance, team success, injury, illness or any other athletic reason. (Em. Ex. 5, NU 000971). As such, there is no agreement to perform specific athletic services in exchange for the scholarship.

Additionally, when making these findings, the Regional Director emphasized the revenue generated by the football program. (Decision at 14, 19). Putting aside that the revenue is not relevant to the legal question as to who is or is not an employee, there was evidence that: (i) the revenue from the football program must be used to support other expenses incurred by the athletic department (Tr. 685-687, Em. Ex. 11), (ii) NU loses \$12.7 million dollars annually on its athletic programs (Tr. 676-677, Em. Ex. 11);

and (iii) the multi-million dollar deficit is made up each year by NU (Tr. 651-653, Em. Ex. 11).

These facts show that the athletic programs, including the football program, are operated by NU as part of its commitment to education and not as a separate economic enterprise. To put it another way, given that there is an annual loss of \$12.7 million dollars, if NU were a typical employer and if this were a typical economic enterprise as indicated by the Regional Director, it would have closed. Accordingly, the Regional Director's finding that scholarship football players receive pay in exchange for athletic services in the manner of an employment relationship is in error.

C. The Finding That Scholarship Football Players are Employees Is Not Consistent with the Policy of the NLRA and Will Negatively Impact the Educational Process

Section 2(3) of the NLRA does not contain a detailed definition of "employee." Because of that, the NLRB and the U.S. Supreme Court have recognized that it is appropriate in some cases to take into account the policy of the NLRA when evaluating who is and who is not an "employee" within the meaning of the Act. *Brown University*, 342 NLRB 483 (2004); *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S.Ct. 383 (1971).

In *Allied Chemical*, the Supreme Court commented upon the policy of the NLRA when it determined that retirees were not "employees." In that case, the Court stated that the NLRA is concerned with the economic relationship between the interests of capital and labor, and equalizing that relationship by protecting labor's right to

organize and to bargain collectively. In this way, the harm resulting from labor disputes can be avoided and commerce safeguarded. 404 U.S. at 166.

In that case, the Supreme Court also stated that when analyzing who is an employee under the Act, “the term ‘employee’ is not to be stretched beyond its plain meaning embracing only those who work for another for hire.” *Id.* at 166.

Furthermore, the Board and the Supreme Court have recognized that, given the Act’s focus on economic relationships and upon the promotion of equal bargaining power, the Act is not well suited to educational relationships. *See San Francisco Art Institute*, 226 NLRB 1251 (1976); *The Leland Stanford Junior University*, 214 NLRB 621 (1974); *Saga Food Service of California, Inc.*, 212 NLRA 786 (1974). Such is the case here.

If scholarship football players are determined to be “employees” and collective bargaining is imposed in this case, the educational process will suffer, and the student-athlete model of education will be undermined - without providing additional safeguards to commerce. These negative consequences – none of which are consistent with the policy or intent of the NLRA – become evident when: (i) other employment laws come into play, and (ii) collective bargaining is applied to traditional classroom prerogatives and to decisions affecting student-athletes.

First, if a student-athlete is an employee under the NLRA, he may also qualify as an employee under, among other federal laws, the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Consolidated Omnibus Reconciliation Act (COBRA), the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA). Similarly, student-athletes may also come within the scope of the companion

state laws, as well as state worker's compensation and unemployment benefit programs and pension laws. The impact of these employment laws (and the related state employment laws) if they are imposed, would be disruptive to the educational process.

For example:

1. The Fair Labor Standards Act. Under the FLSA, the university would be required: (i) to keep accurate records of the time "worked" by each student-athlete during the work week, (ii) to pay the student-athlete time and one-half for each hour worked during the work week in excess 40, and (iii) to pay the student-athletes consistent with the minimum wage laws. The imposition of these requirements would burden the relationship between student-athlete and the university, and make it impracticable and potentially adversarial.

For example, in order to comply with the FLSA, there would have to be a determination as to what constitutes "work;" does it include: travel time to and from games, team movie night, mandatory meetings with tutors and other academic support programs, and voluntary athletic activities? Once it was determined what constituted "work," a means of accurately recording those hours would need to be implemented, such as a time clock or similar device. Also, if overtime payments were due during any work week, it is not clear how this payment would be made or how it would impact Title IX of the Education Amendment of 1972.

Finally, depending on the value of the scholarship and the number of hours "worked," the minimum wage could come into play and supplemental payments would have to be made. Again, it is unclear how this would impact Title IX. In any

case, the imposition of hour counting requirements, overtime and the minimum wage will change the nature of the relationship between the student-athlete and the university and potentially lead to disagreement and controversy.

2. Title VII of the Civil Rights Act. Under Title VII, student-athletes – as employees of the university – would have the right to institute an adversarial proceeding against the university with the Equal Employment Opportunity Commission. This right may be invoked whenever the student-athlete experiences an adverse job action allegedly based upon his status within a protected category (i.e., race, color, national origin, religion and sex) So, every time a student-athlete is dropped on a depth chart, or disciplined, a charge can be filed with the EEOC, and the university will be required to file a position statement demonstrating that it had a legitimate non-discriminatory reason for the job action.

Similar complicating issues and adversarial situations will arise under other federal laws and a host of accompanying state laws. The impact of this will undermine traditional educational freedoms, authority and discipline, all without advancing any policy behind the NLRA.

Second, putting aside the potential adversarial confrontations that can arise under the various employment laws, the union grievance process would also come into play every time the university makes a decision affecting the student-athlete's scholarship or his eligibility. This would result if there were allegations or findings that the student-athlete: (i) committed academic impropriety, (ii) failed to properly perform class work resulting in an insufficient grade point average, (iii) committed an honor

code violation, or (iv) committed a serious violation of NCAA, Big Ten or university rules. These confrontations would also interfere with the academic decision making process and undermine the university's authority.

Third, the educational process will be undermined by the imposition of collective bargaining. Consistent with the NLRA, the union may bargain over every term and condition affecting the "employment." While the scope of that is not clear in the student-athlete context, it could include bargaining over: admission standards for athletes, minimum grade point requirements, processes or rules addressing conflicts between class and practice, processes and procedures for missing tests or other course requirements that conflict with football activities or any other rule affecting the student-athlete. All of these potential collective bargaining topics encroach upon traditional educational freedoms without advancing the policy of the NLRA.

While the full extent to which the educational process will be impacted by this Decision is currently not known, the risk of significant harm exists. The Board in *Brown University* was aware of these risks, deemed them inconsistent with the NLRA, and specifically declined to recognize graduate students to be employees under the Act.

[t]here is a significant risk and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process. Although the dissent dismisses our concerns about collective bargaining and academic freedom at private universities as pure speculation, their confidence in the process in turn relies on speculation about the risks of imposing collective bargaining on the student-university relationship. We decline to take these risks with our nation's excellent private educational system. *Id.* at 493.

Accordingly, if student-athletes are determined to be employees under the NLRA, that determination will impact upon traditional educational freedoms and undermine the university in its mission of educating the student-athletes and preparing them for success in life. This impact is inconsistent with the policy of the Act and prior Board rulings.

D. The Finding That Scholarship Football Players are Employees Is Not Consistent with the Policy of the NLRA and Will Negatively Impact the College Model of Athletics

The imposition of collective bargaining on the student-athlete – university relationship, in addition to it undermining the educational process, will also undermine the college model of athletics. This likely result (or the risk of it) is also inconsistent with policy of the NLRA.

Under the current model of college athletics, after the applicant is accepted at NU, and the scholarship is awarded, the student-athlete is entitled to receive a full college education at no cost to him. As the record reflects, at NU, this has resulted in: (i) a 97% graduation rate among the student-athletes, (ii) a cumulative grade point average for its scholarship football players over 3.0, and (iii) student-athletes who have graduated to become *inter alia*, engineers, lawyers, physicians and bankers. This success is due not only to the quality and work ethic of the student-athletes but also to NU, which works hard to educate and to expose its student-athletes to a full range of programs to help them succeed both in school and at life.

While this model has been successful and has allowed students to attend college when they might otherwise not have been able to, this model may be jeopardized by

collective bargaining. As reflected in the record, the introduction of collective bargaining for male, scholarship football players will raise problems and issues, such as:

- In the event of a strike, issues would arise as to whether student-athletes would be permitted to attend class or live in the dormitories; there would also be an issue as to whether the student-athletes could be locked out.
- In the event of a potential disciplinary action, such as being lowered on a depth chart or other action that may be viewed as disciplinary, an issue would arise as to whether the student-athlete has the right to have a union representative present during any investigatory meeting or in a pre-disciplinary meeting as specified in *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 976 (1975). Similarly, whenever a coach's decision is viewed as disciplinary there would be an issue as to whether that decision is subject to grievance proceedings.
- The IRS could consider the value of the scholarship and the in-kind benefits as taxable income. In that event, the tax burden could make it impossible for the student-athlete to accept the scholarship and attend college.
- The taxing authorities in the different states in which games are played could also take the position that the student-athletes are earning income in their states and require that state income taxes be paid by both the resident and the visiting scholarship players.
- Given that many of the potential topics for mandatory bargaining are not within the control of NU, but are required by NCAA or Big Ten rule, an issue would arise as to what topics NU could bargain or to what it could agree.
- Given the requirements of Title IX, bargained for benefits conceded to male athletes and additional payments required under the FLSA could impact what NU must offer and/or pay to the female student-athletes.

At present, it is not known how these issues will be resolved. But they will cause confusion, undermine the coaches' roles as leaders, undermine the authority of the university, and will make the student-athlete – university relationship more adversarial. These consequences are inconsistent with the purposes and policy of the NLRA, which is designed to equalize bargaining power between labor and capital. Historically, the

Board has recognized this and has not imposed collective bargaining on student-athletes. To do so now would be to dramatically expand collective bargaining rights into uncharted territory while risking the destruction of the current successful model of college athletics. *See Brown University.*

IV. CONCLUSION

Based on the foregoing reasons, the Board should reverse the Decision of the Regional Director and find that Northwestern University's students who are receiving football scholarships are not employees within the meaning of the National Labor Relations Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 3rd day of July 2014, a true and correct copy of the foregoing Brief of Amici Curiae, the National Association of Collegiate Directors of Athletics, and the Division 1A Athletic Directors' Association, in support of Respondent Employer was electronically filed under the National Labor Relations Boards' E-Filing Program upon the Case Participants. A courtesy copy was also sent via e-mail transmission upon the Case Participants.

Northwestern University, 13-RC_121359

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